

83-866

No. - .

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ALEXANDER L. STEVAS,
CLERK

**In the
Supreme Court of the United States.**

OCTOBER TERM, 1983.

BOSTON FIREFIGHTERS UNION, LOCAL 718,
PETITIONER,

v.

BOSTON CHAPTER, N.A.A.C.P, INC., ET AL.,
RESPONDENTS.

**Petition for a Writ of Certiorari to the United States Court
of Appeals for the First Circuit.**

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Question Presented.

Is the case moot in light of 1982 Mass. Acts, c. 190, § 25?

Parties.

The caption identifies all parties to the proceeding in the Court of Appeals for the First Circuit whose judgment is sought to be reviewed. They are the same parties to the earlier proceedings in this Court on writ of certiorari, Nos. 82-185, 82-246, and 82-259. The city of Boston and its Fire Commissioner were parties in the District Court proceeding but took no appeal from the District Court decision.

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PETITIONER,

v.

BOSTON CHAPTER, N.A.A.C.P, INC., ET AL.,
RESPONDENTS.

**Petition for a Writ of Certiorari to the United States Court
of Appeals for the First Circuit.**

Boston Firefighters Union petitions for a writ of certiorari to the United States Court of Appeals for the First Circuit, requesting this Court to review the First Circuit's judgment in *Boston Chapter, N.A.A.C.P. v. Beecher*, Nos. 81-1642, 81-1650, 81-1651 and 81-1656 (1st Cir. August 31, 1983).

Opinions Below.

The consolidated opinion on remand of the United States Court of Appeals for the First Circuit is not reported and is reproduced at pages 1a-9a of the appendix hereto.

The opinion on remand follows this Court's *per curiam* order in Nos. 82-185, 82-246 and 82-259. Other relevant opinions of the courts below are reported at 679 F.2d. 965 (1st Cir. 1982) and at 522 F. Supp. 873 (D. Mass. 1981) and are reproduced at pages A1 through A38 of the petition for writ of certiorari in No. 82-185.

Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was entered on August 31, 1983. This petition was filed within ninety (90) days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved.

The constitutional provision is United States Constitution, Art. III, § 2, cl. 1.

The statute is 1982 Mass. Acts, c. 190, § 25.

The text of these provisions is set forth at pages 8a, 9a of the appendix.

Statement of the Case.

A. *Relevant Prior Proceedings.*

An August 7, 1981 order of the District Court enjoined layoffs of Boston firefighters in any manner that would reduce the percentage of minority officers below the 14.7% level obtaining at the commencement of the layoffs in July, 1981. 522 F. Supp. 873 (D. Mass. 1981). Senior non-minority firefighters, entitled by length of service (seniority) to retain their jobs, were terminated. The Court of Appeals affirmed. 679 F.2d 965 (1st Cir. 1982). This Court granted certiorari on November 1, 1982. 459 U.S. ___, 103 S.Ct. 293 (1982). On May 16, 1983, after argument, this Court ruled, in part:

Following the Court of Appeal's decision, Massachusetts enacted legislation providing the City of Boston with new revenue, requiring reinstatement of all police and firefighters laid off during the reductions in force, securing these personnel against future layoffs for fiscal reasons and requiring the maintenance of minimum staffing levels in the police and fire department through June 30, 1983. *See*, 1982 Massachusetts Acts, c. 190, § 25. In light of these changed circumstances we vacate the judgment of the Court of Appeals and remand for consideration of mootness in light of 1982 Mass. Acts, c. 190, § 25.

B. *The Judgment of the Court of Appeals Upon Remand.*

On August 31, 1983, the Court of Appeals entered judgment vacating the District Court's August 7, 1981 order and remanding with directions to dismiss the plaintiff minority firefighters' motion for modification as moot. *Per curiam*, it

explains that the 1982 State Tregor Act's mandatory reinstatement feature and its now expired minimum staffing level feature abated the stake of the junior minority firefighters in their effort to prevent seniority based layoffs. In the First Circuit's view, vacatur of the August 7, 1981 order removed any inhibition on the State Civil Service Commission respecting back pay claims of senior laid off firefighters.¹ The First Circuit admits that a definitive ruling on the constitutionality² of the District Court's order "might facilitate" the Civil Service Commission's resolution of back pay claims. However, in its view, that ruling would be advisory and, as such, impermissible. The First Circuit acknowledges that "[a]ppellants' interest in the resolution of this case shows that the issue here may retain some collateral vitality, but to avoid mootness a case must present live issues and parties with legally cognizable interests"; junior minority firefighters lacked such a personal stake and "[t]he Civil Service Commission must therefore be left to decide the back pay claims under the governing

¹The District Court's order stated:

4. In the event that a firefighter's appeal of his termination to the defendant members of the Massachusetts Civil Service Commission challenges the method of termination set forth herein, the defendant members of the Civil Service Commission are hereby restrained and enjoined from disapproving, invalidating or interfering with the termination on that basis.

(App. 156.) ("App." cites to the record appendix in First Circuit Nos. 81-1642 and 81-1656.)

²The dispute with the August 7, 1981 order extended also to federal statutory issues under 42 U.S.C. §§ 1981, 1983, and 1988, and §§ 703(a), 703(h), and 706(g) of the Civil Rights Act of 1964, as amended (CRA), 42 U.S.C. §§ 2000e-2(a), 2000e-2(h) and § 2000e-5(g); e.g., Brief for Petitioner Local 718 at 13-25, Nos. 82-185, 82-246, and 82-259; Amicus Brief For United States, at 12-25, *id.*; Amicus Brief for AFL-CIO, at 2-30, *id.*; and Amicus Brief for the Equal Employment Advisory Council.

state law without an advisory resolution of the constitutional issue by the federal courts."

C. The Persisting Consequences of the August 7, 1981 Order.

1. The August 7, 1981 Order.

The order enjoined the Fire Commissioner from "reducing, pursuant to any departmental or city program of reductions . . . , the percentage of minority firefighters . . . below [14.7%] of all firefighters" (App. 155), and required establishment and use of racially separate seniority list for ratio layoffs and rehires to maintain this 14.7% level. *Id.* "To this extent, . . . the district court's order superseded the operation of the reverse seniority layoff provisions of the Massachusetts civil service statute. . . ." 679 F.2d at 973.

2. The Layoffs.

Early in July, 1981, Boston implemented an announced program of 207 terminations from its fire department.³ It initiated its program by seniority in compliance with Mass. Gen. Laws c. 31, §§ 33 and 39 and, on July 8, 15, 22, 29 and August 5, 1981, there occurred seniority-based layoffs of 173 firefighters, of whom 81 were black or Spanish-surnamed persons. A sixth wave of 34 firings, to have occurred August 12, 1981, included 32 minority persons (J.A. 42a-44a).⁴ If the announced layoffs observed the statute's seniority rule, 94 non-minority and 113 black and Spanish-surnamed firefighters, all hired in 1978 and later, would have been terminated.

³The number of terminations exceeded the city's announcements; 257 terminations occurred.

⁴"J.A." identifies references to the Joint Appendix in U.S. Supreme Court Nos. 82-185, 82-246, and 82-259.

Since the August 7 order allowed termination of not more than 38 minority firefighters of the 257 Boston firefighters separated, 125 senior firefighters entitled by statute to employment lost it.⁵

3. The Civil Service Appeals.

All firefighters terminated during the city's program filed appeals to the Civil Service Commission, (CSC) pursuant to Mass. Gen. Laws c. 31, § 41. Since the fall of 1981, appealing firefighters and the city of Boston have been engaged in extensive hearings and conferences before a CSC hearing officer involving fiscal, safety and workload, seniority and procedural issues. The 125 senior non-minority firefighters urge that their terminations violated the seniority terms of § 39 of Mass. Gen. Laws c. 31. The city of Boston asserts that the August 7, 1981 order extinguished such rights during its term and that under that order's compulsion, "just cause" existed for the termination of these 125 senior firefighters.

4. Post-"Tregor" Developments.

Upon enactment of 1982 Mass. Acts, c. 190, § 25, all available terminated personnel were rehired by June 30, 1982. Boston Fire Department General Order #46. Reinstatement, however, did not end continuing disadvantages to senior personnel due to the layoffs. Firefighters are paid annual salary increments and some senior firefighters, with enough statutory

⁵The data before the court (J.A. 43a-45a) depicts these consequences: Boston had to recall and retain all minority firefighters hired in 1978 and 7 hired in 1979 and to terminate all 92 non-minority firefighters hired in 1978 and 25 hired in 1977; 83 senior non-minority firefighters went to the street as substitutes; yet a seventh wave, not described in either appendix, saw another 42 senior employees substituted for layoffs.

seniority to withstand layoff if the statute had prevailed, are retarded in step movements. The city justifies these deprivations on the basis that the firefighters were not "on the active payroll."

Reasons for Granting the Writ.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

This case is not moot if intervening events have *not* "completely and irrevocably eradicated the effects" of the August 7, 1981 order. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). Here effects are still chronic when the city of Boston urges that the August 7, 1981 order constitutes "just cause" to defeat seniority-based back pay claims. The Court of Appeals admits that a definite ruling on the federal issues will influence the ultimate disposition of these seniority pay claims. Its admission demonstrates that effects of the August 7, 1981 order persist. Its admission is coupled with an acknowledgement that "the issue here may retain some collateral vitality." Thus when seniority back pay claims are still influenced, and perhaps determined, by the disputed August 7, 1981 order, the second *Davis* condition is not satisfied. Parties still retain "a legally cognizable interest in the outcome" which can be decisive on their entitlements and a live controversy exists presenting adverse legal interests. *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (*per curiam*), quoting *United States Parole Comm'n v. Geraghty*, 455 U.S. 388, 396 (1980) and *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

A case is not moot when present or future consequences can be reached by a judgment, *Sibron v. New York*, 392 U.S.

40, 54-56 (1968) or if an official act has residual force impairing a present interest. *Accord Diffenderfer v. Central Baptist Church of Miami, Florida, Inc.*, 404 U.S. 412, 415 (1972). Decisions of this Court establish that collateral consequences of an expired act conserve challenges from mootness. *Sibron v. New York*, *supra*; *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968). Senior firefighters have a very substantial present stake in a judgment that may be determinative of their back pay claims ensuing from implementation of the August 7, 1981 order. If a complaining party on appeal demonstrates the fact or possibility of adverse present effects of a lower court order, the decisions of this Court require the conclusion that the appeal is not moot. Such adverse present effects persist, as the Court of Appeals recognizes, because of complications and impacts of the order upon relief in the Civil Service Commission proceedings. So long as Civil Service Commission remedies can be influenced to the disadvantage of senior firefighters, a "live controversy" exists that may be determined by a federal judgment resolving a present "legally cognizable interest in the outcome" of the back pay proceeding. *Powell v. McCormack*, *supra*, 395 U.S. at 496. There remains a controversy "definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241 (1937). Although the City of Boston was never a petitioner or appellant, it remains a party with legal interests adverse to senior firefighters' interest.

Conclusion.

The writ should issue and this Court, pursuant to Rule 23.1, should enter a summary order reversing the judgment of the Court of Appeals and should decide the merits of Nos. 82-185, 82-246 and 82-259.

Respectfully submitted,
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Appendix A.

**United States Court of Appeals
for the First Circuit.**

No. 81-1642

BOSTON CHAPTER, NAACP, ET AL.,
PLAINTIFFS, APPELLEES,
v.

NANCY B. BEECHER, ET AL.,
DEFENDANTS, APPELLEES.

BOSTON FIREFIGHTERS UNION, LOCAL 718,
INTERVENOR, APPELLANT.

No. 81-1650

PEDRO CASTRO, ET AL.,
PLAINTIFFS, APPELLEES,
v.

NANCY B. BEECHER, ET AL.,
DEFENDANTS, APPELLEES.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
INTERVENOR, APPELLANT.

NO. 81-1651

PEDRO CASTRO, ET AL.,
PLAINTIFFS, APPELLEES,
v.

NANCY B. BEECHER, ET AL.,
DEFENDANTS, APPELLANTS.

No. 81-1656

BOSTON CHAPTER, NAACP, ET AL.,
PLAINTIFFS, APPELLEES,
v.

NANCY B. BEECHER, ET AL.,
DEFENDANTS, APPELLEES.

CIVIL SERVICE COMMISSION, ET AL.,
DEFENDANTS, APPELLANTS.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Andrew A. Caffrey, *U.S. District Judge*]

Before

Campbell, *Chief Judge*,
Bownes, *Circuit Judge*,
and Perez-Gimenez, * *District Judge*.

Thomas A. Barnico, Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, *Thomas R. Kiley*, First Assistant Attorney General, *E. Michael Sloman*, Assistant Attorney General, and *Marc S. Seigle*, Special Assistant Attorney General, were on brief, for Commonwealth of Massachusetts.

John F. McMahon, with whom *E. David Wanger*, and *Angoff, Goldman, Manning, Pyle & Wanger, P.C.* were on brief, for Boston Firefighters Union, Local 718.

* Of the District of Puerto Rico, sitting by designation.

Frank J. McGee, with whom *Law Office of Frank J. McGee* was on brief, for Boston Police Patrolmen's Association, Inc.

James S. Dittmar, with whom *Peggy A. Wiesenbergl*, *Richard H. Lavin*, *Matthew D. Baxter* and *Widett, Slater & Goldman* were on brief, for plaintiffs, appellees.

August 31, 1983

PER CURIAM. This case is before the court on remand from the Supreme Court for consideration of mootness. The facts and prior proceedings are fully traced in this court's previous opinion, *Boston Chapter, NAACP v. Beecher*, 679 F.2d 965 (1st Cir. 1982). Since 1975, the Boston police and fire departments have been subject to consent decrees requiring preferential hiring of minorities to relieve the effects of prior discrimination. In 1981, facing proposed fiscal layoffs which would substantially vitiate any progress made under the decrees, plaintiffs sought and obtained modification of the original decrees. *Castro v. Beecher*, 522 F. Supp. 873 (D. Mass. 1981). The modifying order prohibited both Boston departments from reducing minority percentages in their workforces, with the practical result that non-minority firemen and police officers would have to be laid off before junior [*sic*] minority firemen and police officers notwithstanding the state's last-hired, first-fired statute.

The modification was affirmed on appeal to this court in the above-cited case, and defendants obtained certiorari from the Supreme Court. Meanwhile, however, Massachusetts enacted the so-called Tregor Act mandating reinstatement of all police and firefighters laid off during the reduction in force. See 1982 Mass. Acts, c. 190, § 25. The Supreme Court therefore

vacated this court's judgment and remanded for consideration of mootness.

"The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review" *Roe v. Wade*, 410 U.S. 113, 125 (1973); *Golden v. Zwickler*, 394 U.S. 103 (1969). When, as here, intervening acts destroy the interest of a party to the adjudication, the case is mooted, *DeFunis v. Odegaard*, 416 U.S. 312 (1974). The Tregor Act's mandatory reinstatement of the laid off police and firefighters and its requirement of minimum staffing levels through June 30, 1983 removed plaintiffs' stake in the proceeding which they had instituted in 1981 at a time when layoffs were taking place.

This is not an example of the "voluntary cessation of allegedly illegal conduct" which does not render a case moot. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). Rather the city of Boston has acted pursuant to a supervening state statute. Furthermore, the case does not present a question "capable or [sic] repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). Future layoffs might occur, but there is no reason to assume that a similar state enactment would once again render the case moot before resolution by the Supreme Court.¹

Appellants' contention that the case remains alive because the modifying order prohibits the adjudication of state Civil Service Commission claims for back pay is not persuasive. According to the established practice of the federal courts, when a case is found moot, the district court's judgment will be vacated. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Thus even assuming, which we do not decide, that the

¹ The Supreme Court has granted certiorari on a case presenting the same issue as the case before us. *Stotts v. Memphis Fire Department*, 679 F.2d 541 (6th Cir. 1982), cert. granted, 51 U.S.L.W. 3871 (June 6, 1983) (No. 82-229). Thus that question may be resolved within the near future.

district court's order directly inhibits the state Civil Service Commission respecting the back pay claims, it will no longer do so. To be sure, a definitive ruling on the constitutionality of the district court's past order might facilitate the Civil Service Commission's resolution of the back pay claims. But such a ruling now — rendered in the absence of a present case or controversy in this proceeding — would amount to no more than an advisory opinion. The federal courts are forbidden by Article III of the Constitution from giving advisory opinions. See, e.g., *North Carolina v. Rice*, 404 U.S. 244 (1971); *St. Pierre v. United States*, 319 U.S. 41 (1942). Appellants' interest in the resolution of this case shows that the issue here may retain some collateral vitality, but to avoid mootness a case must present both live issues and parties with legally cognizable interests. *United States Parole Commission v. Geraghty*, 445 U.S. 388, 396 (1980). Plaintiffs now lack the "personal stake" necessary to keep alive the controversy which engendered this proceeding. The Civil Service Commission must therefore be left to decide the back pay claims under the governing state law without an advisory resolution of the constitutional issue by the federal courts.

Accordingly, we vacate the district court's order of August 7, 1981 and remand to the district court to dismiss as moot the motion for modification, without prejudice to further actions under the district court's continuing jurisdiction to monitor the original consent decrees. *Crowell v. Mader*, 444 U.S. 505, 506 (1980); *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 415 (1972); *Romero-Barcelo v. Brown*, 643 F.2d 835, 862 (1st Cir. 1981).

Vacated and Remanded.

Appendix B.

**United States Court of Appeals
for the First Circuit.**

No. 81-1642

BOSTON CHAPTER, NAACP, ET AL.,
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v.

NANCY B. BEECHER, ET AL.,
DEFENDANTS, APPELLEES.

BOSTON FIREFIGHTERS UNION, LOCAL 718,
INTERVENOR, APPELLANT.

No. 81-1650

PEDRO CASTRO, ET AL.,
PLAINTIFFS, APPELLEES,

v.

NANCY B. BEECHER, ET AL.,
DEFENDANTS, APPELLEES.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
INTERVENOR, APPELLANT.

No. 81-1651

PEDRO CASTRO, ET AL.,
PLAINTIFFS, APPELLEES,

v.

NANCY B. BEECHER, ET AL.,
DEFENDANTS, APPELLANTS.

No. 81-1656

BOSTON CHAPTER, NAACP, ET AL.,
PLAINTIFFS, APPELLEES,
v.
NANCY B. BEECHER, ET AL.,
DEFENDANTS, APPELLEES.

CIVIL SERVICE COMMISSION, ET AL.,
DEFENDANT APPELLANTS.

Judgment

Entered August 31, 1983

These causes came on to be heard on remand from the United States Supreme Court and was argued by counsel.

Upon consideration whereof, It [*sic*] is now here ordered, adjudged and decreed as follows:

The District Court's order of August 7, 1981, is vacated and the causes are remanded to that court with directions to dismiss as moot the motion for modification consistent with the opinion filed this day.

No costs.

By the Court:

FRANCIS P. SCIGLIANO

Clerk.

Appendix C.

UNITED STATES CONSTITUTION.

Article III, § 2, Cl. 1.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

MASSACHUSETTS ACTS OF 1982.

Chapter 190.

AN ACT ESTABLISHING THE CITY OF BOSTON FUNDING LOAN ACT
OF NINETEEN HUNDRED AND EIGHTY-TWO AND THE MASSACHU-
SETTS CONVENTION CENTER AUTHORITY.

SECTION 25. Notwithstanding the provisions of any general or special law to the contrary, the appointing authority of the police department and the fire department of the City of Boston shall reinstate to active service as of the effective date of this act any uniformed officer of either department who was in service or on injured leave as of July first, nineteen hundred and eighty-one, or was temporarily suspended as of July first,

nineteen hundred and eighty-one, which suspension has expired, except for disciplinary reasons consistent with chapter thirty-one of the General Laws or in pursuit of an involuntary retirement under section seven of chapter thirty-two of the General Laws and shall not thereafter terminate any such officer or take any other personnel action the effect of which would be to separate such officer from active service in the future for lack of funds. During the fiscal years ending June thirtieth, nineteen hundred and eighty-two and June thirtieth, nineteen hundred and eighty-three the City of Boston shall maintain in the police department and the fire department of the City of Boston, either in active service, training or recruitment, no fewer uniformed employees than the total of the number in service or on injured leave on March twenty-fourth, nineteen hundred and eighty-two plus the number of uniformed employees eligible for reinstatement pursuant to this section, without regard to the number of eligible uniformed employees who actually return to service in either department. Nothing herein shall prevent an employee of either department from being placed in [*sic*] injured leave under the provisions of section one hundred and eleven F of chapter forty-one of the General Laws. The mayor shall annually request and the city council shall annually appropriate sufficient amounts to the respective departments to cover the costs imposed by this section, but nothing in this section shall be construed to permit the officers in charge of said departments to expend funds in excess of available appropriations in violation of the city charter.

Nos. 83-866, 83-885

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**Brief of Respondents in Opposition to Petitions
for a Writ of Certiorari to the United States
Court of Appeals for the First Circuit**

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Question Presented

Should the Supreme Court review the decision of the court of appeals holding that the controversy is moot, where that decision is based upon well established principles of federal jurisdiction, and where petitioners' challenge to the decision is based upon asserted matters of fact which are not in the record below and upon the pendency of state administrative proceedings which are governed by state law?

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Nos. 83-866, 83-885

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**Brief of Respondents in Opposition to Petitions
for a Writ of Certiorari to the United States
Court of Appeals for the First Circuit**

Opinions Below

Respondents agree with the identification of Opinions Below stated in the petitions for certiorari, but note that the consolidated opinion on remand of the United States Court of Appeals for the First Circuit has been reported at 716 F.2d 931 (1st Cir. 1983).

Constitutional and Statutory Provisions

The petitions involve U.S. Const. Art. III, § 2, cl. 1, which is reproduced at page 8a of the Appendix to the petition of Boston Firefighters Union, Local 718.

The statutes involved are 1982 Mass. Acts, c. 190, § 25, which is reproduced at page 9a of the Appendix to the petition of Boston Firefighters Union, Local 718, and Mass. Gen. Laws c. 31, § 43, which is reproduced at page 1a of the Appendix to this brief.

Statement of the Case

These petitions seek to have the Court grant certiorari in order to decide a question of mootness which the Court has already heard and committed to the court of appeals. Petitioners challenge a decision which accords fully with established mootness doctrine and seek review based upon claims which rely upon matters of fact not in the record below and the pendency of state administrative proceedings which are governed by state law.

A. Prior Proceedings

The decision of the court of appeals found moot a controversy which arose in the course of ongoing judicial administration of relief in consolidated employment discrimination cases relating to Boston's police and fire departments. The cases have lengthy histories, with which the Court is familiar. See Supreme Court Nos. 82-185, 82-246, 82-259. The controversy which the court of appeals found moot, however, was more recent and short-lived.

In July 1981, in response to an asserted fiscal crisis, the City of Boston instituted a massive reduction in force program in its police and fire departments. The program was to be administered in accordance with the Massachusetts civil service statute, which requires layoffs in reverse order of seniority. Black and Hispanic police officers and firefighters challenged the application of the seniority statute to the layoff program by applying to the district court for modification of prior court orders in order to prevent the City from reducing their proportional representation below the levels obtaining at the time the program commenced.

The minority officers' requests for modification were opposed by the state civil service officials and intervening unions. They were not opposed by the City or its police and fire commissioners.

The district court held that the application of the Massachusetts seniority statute to the layoff program would interfere with the court's ongoing remedial process. By orders dated August 7, 1981, the court enjoined the police and fire commissioners from reducing the percentage of minority officers obtaining at the commencement of the layoff program.

The court of appeals affirmed.

B. The Political Resolution

In June 1982 Massachusetts enacted legislation resolving the City's asserted fiscal crisis and rescinding the reduction in force program. 1982 Mass. Acts c. 190. The statute, known as the Tregor Act, provided the City with new funds and required the reinstatement of all police officers and firefighters who had been laid off as a result of the reduction in force program. The Tregor Act also provided that the City shall not terminate or otherwise separate any reinstated personnel from active service "in the future for lack of funds." *Id.* § 25. Finally,

the Act required the maintenance of minimum staffing levels in the police and fire departments through June 30, 1983. *Id.* As a result of the Tregor Act, the police and fire departments reinstated, or offered to reinstate, all personnel terminated during the City's 1981 reduction in force program.

C. *Disposition by the Supreme Court*

Following enactment of the Tregor Act, the police and fire unions and the state civil service officials petitioned for certiorari. The Court granted certiorari, and on April 18, 1983 the Court heard oral argument on the merits. In their brief on the merits and at oral argument, the minority officers argued that the controversy giving rise to the lower courts' decisions had become moot.

On May 16, 1983, the Court issued a per curiam opinion which vacated the judgment of the court of appeals and remanded the cases for consideration of mootness in light of the Tregor Act. *Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP, Inc.*, 51 U.S.L.W. 4566 (U.S. May 16, 1983).

D. *The Court of Appeals' Opinion on Remand*

On August 31, 1983, in a per curiam decision, the court of appeals held that the minority officers' motions to modify the prior remedial decrees were moot. *Boston Chapter, NAACP v. Beecher*, 716 F.2d 931 (1st Cir. 1983). The court vacated the district court's August 7, 1981 orders and remanded the cases to the district court to dismiss as moot the motions for modification.

The court of appeals held that "to avoid mootness a case must present both live issues and parties with legally cognizable interests." *Id.* at 933. In light of the Tregor Act's mandatory reinstatement of all laid off officers and its requirement of minimum staffing levels through June 1983, the court of appeals

concluded that the minority officers "now lack the 'personal stake' necessary to keep alive the controversy which engendered this proceeding." *Id.*

Before the court of appeals, the unions had argued that non-minority officers' claims for back pay which were pending before the Massachusetts Civil Service Commission kept the controversy alive. In response, the court of appeals stated that since the minority officers no longer had any personal stake in the controversy, a ruling by the federal court "would amount to no more than an advisory opinion." *Id.*

The court of appeals also rejected the state civil service officials' argument that the controversy remained alive because the district court's orders allegedly prohibited the Massachusetts Civil Service Commission from adjudicating the back pay claims. The court noted that "[a]ccording to the established practice of the federal courts, when a case is found moot, the district court's judgment will be vacated." *Id.* Therefore, even assuming that the district court's orders inhibited the Commission's adjudication, "[they] will no longer do so." *Id.* The civil service officials, notably, have not petitioned for certiorari.

Reasons for Denying the Writ

I. THE COURT OF APPEALS' MOOTNESS DECISION DOES NOT WARRANT REVIEW

Petitioners seek certiorari review of a decision which does not warrant such attention. The decision of the court of appeals addressed only a question of mootness, and the resolution of that question is unlikely to have impact beyond the confines of these cases.

Indeed, even within the confines of these cases, the decision of the court of appeals had an impact which was palliative only.

The court of appeals found the controversy originally before it to be moot. That court, just as had the Court previously, followed the "established practice" for treating civil cases which become moot while on appeal and vacated the lower court's orders. See *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Thus the continuing mandate, and even precedential significance, of the district court and court of appeals' prior decisions have been eliminated.

II. THERE IS NO CONFLICT WITH PRIOR DECISIONS OF THE COURT, FOR THE DECISION OF THE COURT OF APPEALS IS BASED ON WELL ESTABLISHED PRINCIPLES OF FEDERAL JURISDICTION

The court of appeals held that the controversy is moot because the minority officers no longer have any personal stake in the outcome. It is a fundamental principle of federal jurisdiction that all parties must retain a personal stake in the resolution of a controversy; hence review of a decision based on this principle is not warranted.

In order to satisfy the case or controversy requirement of Article III, a complaining party must show "an injury to himself which is likely to be redressed by a favorable decision." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976). Without any present or threatened injury, a party has no personal stake in a controversy, and the court cannot be assured of "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional issues." *Baker v. Carr*, 369 U.S. 186, 204 (1962). As the Court stated in *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980), "the purpose of the 'personal stake' requirement is to assure that the case is in a form capable of judicial resolution."

As a result of the Tregor Act, minority officers no longer risk loss of their jobs due to application of the seniority statute to

the City's now abandoned layoff program. The court of appeals found that the threat of injury to the minority officers which had originally created a live controversy is now removed. The court concluded that the minority officers "now lack the 'personal stake' necessary to keep alive the controversy which engendered this proceeding." *Boston Chapter, NAACP v. Beecher*, *supra*, 716 F.2d at 933.

In their petitions for certiorari, the unions argue that state law claims of reinstated non-minority officers which are assertedly pending before the Massachusetts Civil Service Commission are sufficient to keep the federal controversy alive. The minority officers, however, are not parties to the state administrative proceedings and have no stake in their resolution. Since the minority officers have no stake in the resolution of someone else's back pay claims, the existence of those claims cannot create a live controversy involving the minority officers. See *Flast v. Cohen*, 392 U.S. 83, 99 (1968). A decision by the federal court, rendered in the absence of a present case or controversy between the unions and minority officers, "would amount to no more than an advisory opinion." *Boston Chapter, NAACP v. Beecher*, *supra*, 716 F.2d at 933.

Indeed, two of the three parties with a real interest in the back pay proceedings are not even before the Court. The state has not filed a petition for certiorari; and the City, which is the only party with an interest adverse to the union members' claims for back pay, has never taken any position on the merits of the federal issues during the entire course of federal court proceedings. If the only controversy which persists is the union members' claims for back pay, that controversy is best resolved in the state administrative proceedings where the parties with truly adverse interests can advocate their respective positions.

III. PETITIONERS' CLAIMS DEPEND UPON MATTERS OF FACT NOT IN THE RECORD AND UPON QUESTIONS OF STATE LAW

The petitions are based on factual matters which are not in the record and on questionable interpretations of state law. The Court should decline review under these circumstances.

The unions' petitions are premised on the assertion that a federal court decision on the merits will affect the resolution of the union members' claims for back pay. See Fire Petition at 7; Police Petition at 11. This assertion cannot be adequately evaluated by the Court, however, for the record below contains virtually no information relating to claims of non-minority officers for back pay or the status of any Massachusetts Civil Service Commission proceedings relating to such claims. There was before the court of appeals, to be sure, an assertion that back pay claims had been brought by some officers. Beyond that, however, there is nothing in the federal court record reflecting the nature of the claims assertedly made in the administrative proceedings, identifying the issues raised by the parties who are participating in those proceedings, discussing the state law applicable to those claims or clarifying the present stage of the proceedings.¹ In this regard, the unions' petitions are notably devoid of any record citation which would disclose what is taking place in the state administrative proceedings or reveal how a federal court decision would influence the outcome of those proceedings.

In any event, the back pay claims must be made under state law, and it is likely that the Civil Service Commission will resolve, or already has resolved, those claims without requiring

¹ The minority officers, in fact, understand that on February 11, 1982, the Civil Service Commission denied the police officers' claims for back pay, and that no appeal was taken from that decision to the state superior court. Consequently, it would appear that there is no proceeding, of any sort, presently pending with respect to the impact of the layoff program on police officers.

any disposition of the federal issues raised in the federal court proceedings. If resolution of the federal controversy is unnecessary to disposition of the union members' claims for back pay, then even the unions would have no basis to claim a continued interest in the outcome of the federal proceedings.

Presumably the issue raised in civil service proceedings is whether layoffs were "justified". Mass. Gen. Laws c. 31, § 43. This is an issue of Massachusetts law, not federal law. To the extent, moreover, that the administrative proceedings might inquire into whether layoffs in compliance with a federal court order are justified, Massachusetts law, as well as federal law, indicates that there is no likelihood that federal appellate review, even reversal, would have any bearing upon civil service claims. The layoffs were accomplished pursuant to outstanding federal court orders. As such, they were justified at the time they were implemented. This justification cannot be lost by any subsequent reversal of the orders. A court order validly entered, when the court has both subject matter and personal jurisdiction, gives rise to a plain legal duty to obey until it is stayed, vacated or reversed. See *Town of Stow v. Marinelli*, 352 Mass. 738, 743-44, 227 N.E.2d 708, 713 (1967); *Maness v. Meyers*, 419 U.S. 449, 458-59 (1975); *United States v. United Mine Workers of America*, 330 U.S. 258, 293 (1947).²

² The Firefighters Union asserts that the court of appeals found that resolution of the federal law issues "will influence" the disposition of the back pay claims. Fire Petition at 7. This mischaracterizes the opinion of the court of appeals. The court merely assumed *arguendo* that a federal court decision "might facilitate" the resolution of the back pay claims, and held that in any event, "such a ruling now — rendered in the absence of a present case or controversy — would amount to no more than an advisory opinion." *Boston Chapter, NAACP v. Beecher*, *supra*, 716 F.2d at 833.

Conclusion

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix

MASSACHUSETTS GENERAL LAWS

Chapter 31, § 43

If a person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, so request in writing to the commission, he shall be given a hearing before a member of the commission or some disinterested person designated by the chairman of the commission. Said hearing shall be commenced in not less than three nor more than ten days after the filing of such request and shall be completed within thirty days after such filing unless, in either case, both parties shall otherwise agree in a writing filed with the commission, or unless the member or hearing officer determines, in his discretion, that a continuance is necessary or advisable. Upon completion of the hearing, the member or hearing officer shall file forthwith a report of his findings with the commission. Within thirty days after the filing of such report, the commission shall render a written decision and send notice thereof to all parties concerned.

The commission shall affirm the action of the appointing authority if it finds that such action is justified. Otherwise it shall reverse such action, and the person concerned shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.

Any hearing pursuant to this section shall be public if either party so requests in writing. The person who requested the hearing shall be allowed to answer, personally or by counsel, any of the charges which have been made against him.

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The decision of the commission made pursuant to this section shall be subject to judicial review as provided in section forty-four.

Saturdays, Sundays and legal holidays shall not be counted in the computation of any period of time specified in this section.

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